IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A.,MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 129 B OF 2015

MASALU LUPONYA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 16th day of March, 2015
in
H/C Criminal Sessions Case No. 91 of 2012
.....
JUDGMENT OF THE COURT

19th & 26th October, 2016

RUTAKANGWA, J.A.:

The appellant was aggrieved by the decision of the High Court sitting at Mwanza in Criminal Sessions Case No. 91 of 2012. He believed, although wrongly, that he had been convicted as charged of the murder of one Maria d/o Kabehe on 5th May, 2011, and duly sentenced to suffer death by hanging, hence this appeal.

In this appeal, the appellant was represented by Mr. Vedastus Laurean, learned advocate, who had lodged a one-ground memorandum of appeal. This single ground of appeal ran as follows:-

"That the trial Court erred in law in convicting the appellant relying on uncorroborated confessions."

When the appeal came before us for hearing, the appellant appeared in person and was being advocated for by Mr. Laurean. For the respondent Republic, Mr. Lameck Merumba, learned State Attorney, appeared.

Mr. Laurean, came prepared to prosecute the appeal on the basis of the above mentioned sole ground of complaint. However, before he could address us on the point, we referred him to page 65 of the record of appeal, as it is clear at this page that no conviction was entered by the trial High Court ("trial Court"). The record reads thus:-

"I accordingly, find ***MASALU S/O LUPONYA*** *guilty as charged of the offence of murder of* ***MARIA D/O KAHEBE C/S 196 of the Penal Code, Cap 16 R.E. 2002.*** *I hereby sentence the accused* ***MASALU S/P LUPONYA*** *to suffer the sentence of death as per section 197 of the Penal Code."*

In view of the above, we asked Mr. Laurean if he had any good cause for complaining that the appellant was "convicted" on the basis of uncorroborated confessions. When it dawned on him that, after all, the appellant has never been convicted of the murder of Maria s/o Kahebe, he changed his stance. He submitted that failure by the trial court to enter a conviction, was a clear violation of the

provisions of sections 298, 312 (2) and 314 of the Criminal Procedure Act, Cap 20, Vol. 1 R.E., 2002 ("the CPA"). He accordingly urged us to quash the trial court's judgment, nullify the death sentence and set the appellant at liberty.

Mr. Merumba was to a great extent in full agreement with Mr. Laurean but he went further. He pressed us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141("the AJA") to nullify the judgment and death sentence and thereafter remit the record to the learned trial judge with directions to her to enter a conviction in accordance with the dictates of the law.

On our part, we have no reason to differ with the position taken by both learned counsel on this legal issue. We are not being called upon to sail in uncharted waters. Although both counsel did not refer us to any decision in support of their position, we are comforted by the fact that the law on the issue is well settled as we shall presently demonstrate.

The procedure in trials before the High Court is provided for in Part VIII of the C.P.A. which runs from sections 264 to 299. Section 282 of this Act provides as follows:-

> *"If the accused pleads guilty, the plea shall be recorded and he may be convicted thereon."*

It is clear from this provision that a conviction will inevitably follow a plea of guilty where, of course, that plea is unequivocal, hence the use of the word "may". Section

228(1) of the C.P.A. is to the same effect in respect of trials before the subordinate courts.

Section 283 provides thus:-

> *"If the accused person pleads 'not guilty' or if the plea of 'not guilty' is entered in accordance with the provisions of section 281, the court shall proceed to choose assessors, as provided in section 285, and try the case."*

The trial is thereafter conducted under the provisions of sections 284 to 298. It is unambiguously provided in section 298(3) that:-

> *"If the accused person is convicted the judge shall pass sentence on him according to law."*

It is goes without saying, therefore, that a trial in the High Court ends up with either an acquittal or a conviction, otherwise it will be incomplete. We have found the provisions of section 298(3) of the C.P.A. to be identical with the provisions of section 187K of the Zanzibar Criminal Procedure Act, No. 7 of 2004 of the Laws of Zanzibar ("the Zanzibar Act").

Section 312 of the C.P.A. deals with the contents of judgment. This section provides thus in sub-sections (1) and (2):-

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the*

personal direction and superintendence of the presiding ***judge or magistrate*** *in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*

(2) ***In the case of conviction*** *the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the* ***accused person is convicted*** *and the punishment to which he is sentenced."* [Emphasis in ours].

It is further provided in plain language as follows in section 314 of the C.P.A.:-

"If the judge ***convicts*** *the accused person or if he pleads guilty, it shall be the duty of the Registrar or other officer of the court to ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings."*

In our endeavours to reach an effectual determination of this legal issue, we remained alive to the requirements of Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977. It is provided in sub-article 6 (a) that in order to ensure

equality before the law, the State shall provide for appropriate procedures which will take into account the principle that when the rights and duties of any person are being determined by the courts or any other authority, that person shall be accorded a full hearing and also the right of appeal or equivalent legal relief, from the decisions of the courts or that other decision making authority.

From the above constitutional premise, this Court in the case of **Khamis Rashid Shaban v. the D.P.P. Zanzibar,** Criminal Appeal No. 184 of 2012 (unreported) in which we faced an identical problem, held thus:-

> *"Taken at its face value, this complaint engenders no controversy or complications. But this is far from the reality, given the fact that there is no inherent right of appeal to this Court from every decision of any Court or Tribunal. In this particular case, the appellant derives his right of appeal from section 6(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA).*
>
> *The said section 6(1) reads as follows:-*
>
> *"6-(1) Any person **convicted** on a trial held by the High Court or by a subordinate court exercising extended power may appeal to the Court of Appeal:-*

(a) Where he has been sentenced to death against ***conviction*** *on any ground of appeal; and*

(b) In any other case:

(i)Against ***conviction*** *on any ground of appeal, and*

(ii) Against the sentence passed on ***conviction*** *unless the sentence is one fixed by law."*

From the underlined words, it is crystal clear that the appellant Khamis Rashid Shaaban could only validly lodge an appeal in this Court against a conviction for murder, hence the second ground of appeal."

The Court went further and emphasized that:-

"We wish to make it absolutely clear that the peculiar circumstances of this purported appeal have forced us to go into these statutory details in order to demonstrate that the law strictly requires the trial High Court to specifically enter a conviction after being satisfied of the guilt of the accused. That is why even where a plea of guilty is entered, a conviction is necessary. Short of that, both the accused and the prosecution would be greatly prejudiced by the omission to enter a

conviction, as we shall shortly demonstrate. A declaration that a accused is guilty is not sufficient to bring into pay the provisions of these sections or s. 128 of the Act, or even s.6 (1) of the AJA. An accused, for instance, cannot be lawfully sentenced to any punishment, unless and until, he or she has been duly convicted of a particular offence."

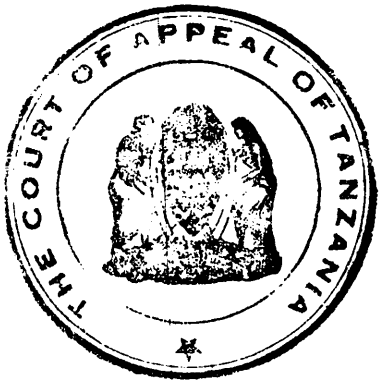
What we said in the **Khamis Rashid Shaban** case, applies with equal force to the undisputed facts of this appeal. There is no gainsaying that the learned trial judge neither convicted the appellant, nor heard him in mitigation, having regard to the provisions of section 26 as of the Penal Code, Cap. 16 and section 314 of the CPA. We are of the respectful opinion that this was an inadvertent omission, which all the same greatly prejudiced the appellant by being sentenced to death without being convicted. In our respectful finding, therefore, that omission to enter a conviction was a fatal and incurable irregularity. The Court so held in the case of **Masolwa Samwel v.R.,** Criminal Appeal No. 206 of 2014 (unreported), in which the appellant had been sentenced to death by hanging without being convicted.

In the light of the above findings and the clear stance of the law, we have found ourselves enjoined to invoke our revisional powers under section 4(2) of the AJA. We quash and set aside the judgment of the trial court, which carries no

conviction of the appellant. The death sentence is also quashed and set aside. The learned trial judge is directed to prepare a judgment in accordance with the provisions of the C.P.A. If this will prove to be impossible for whatever good reason, the appellant should be tried afresh. In the meanwhile, the appellant should remain in custody as a remandee.

DATED at MWANZA this 20th day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL



S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL